



# **DEPARTMENT OF JUSTICE**

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## **REFLECTIONS ON THE ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS**

**Remarks by**

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## Introduction

Good afternoon. Let me start by thanking my good friend Ray Gifford for the kind introduction. Thank you also to Phil Weiser and the Silicon Flatirons program for inviting me to speak to you today. I grew up here in Colorado; I'm thrilled every time I have the opportunity to return to our beautiful State. And what an impressive group you have assembled today.

I'm privileged to have been associated with several members of the Antitrust Modernization Commission, some of whom are here today. I was Commissioner Kempf's partner in private practice; I succeeded Commissioner Delrahim as Deputy Assistant Attorney General in the Antitrust Division; and I've been honored to work alongside Chairman Garza and Commissioner Carlton in the Antitrust Division.

America's antitrust laws, starting with the Sherman Act's enactment in 1890, are among the most enduring bodies of law in our legal system, and among the most important to the vitality of our nation's economy. Notwithstanding their importance and durability, drastic changes in technology and business practices, accompanied by advances in economic analysis and its application to antitrust, have resulted in periodic calls for evaluation and assessment of the antitrust laws.

In general, I think these assessments have led to significant improvements in substantive antitrust doctrine as well as in the effectiveness of antitrust enforcement. These include: the enactment of the Hart-Scott-Rodino Act after recommendations in the 1969 Neal Report; the continuing move away from *per se* rules and greater analytical power of the rule of reason that began with the 1955 Attorney General's National

Committee to Study the Antitrust Laws; and the expansion of the scope of antitrust stemming from the recommendations for deregulation in the Shenefield Report. Significantly, however, the original Sherman Act has been left basically intact.

The latest round of review by the Antitrust Modernization Commission yielded a body of carefully considered recommendations. Many of these recommendations reflect a broad consensus among antitrust experts about changes, clarifications, or legislative action that have been long overdue. Other recommendations emerged out of a focused discussion of the most significant challenges to antitrust, and whether antitrust law can continue to protect consumers and competition in the face of new business practices, structural change in the economy, and constantly evolving approaches to regulation and intellectual property, among other things. Some of the AMC's recommendations concern the Antitrust Division's enforcement activities as well as those of the Federal Trade Commission. As the Division continues to consider the AMC's recommendations, my observations today represent our current thinking on these issues.

The AMC's report organized its recommendations along four broad areas: Substantive Standards of Antitrust Law, Enforcement Institutions and Processes, Civil and Criminal Remedies, and Government Exceptions to Free-Market Competition. I would like to discuss several of the general and specific recommendations, especially as they relate to the Division's recent priorities: competition advocacy on immunities and exemptions, criminal enforcement, increasing the transparency and efficiency of merger review, and clarifying enforcement under Section 2 of the Sherman Act.

## **I. Immunities and Exemptions**

I would like to start my discussion with the AMC's recommendations regarding immunities and exemptions. I believe the general thrust of these recommendations – which I summarize as making immunities and exemptions more infrequent and harder to procure – deserves great praise. The free market economy, supported by antitrust enforcement when and where appropriate, has made our economy the envy of the world. Competition among firms to succeed in an unfettered marketplace has resulted in better, more innovative, and less expensive products for American consumers. That is a remarkable achievement.

Competition is hard work, so it is not surprising that firms and industries will sometimes seek legislative relief from these labors. Without any particular firm or industry in mind, I will emphasize that special treatment in the form of exemptions from competition and competition law typically harms, rather than helps, consumers. Proponents of exemptions often claim that their industry presents special circumstances that require antitrust to be scaled back to allow pro-competitive conduct. The Division has no interest in getting in the way of pro-competitive conduct, and thanks to advances in economic thinking, legal doctrine, and analytical tools at the agencies, antitrust law today is very effective at distinguishing pro-competitive conduct from conduct that harms competition and consumers.

Many immunities and exemptions from antitrust enforcement appear to be unwarranted; some even are anachronistic. In the vast majority of situations, if there is a risk that conduct sought to be protected could harm competition, it then should be subject

to antitrust scrutiny; if, on the other hand, businesses claim that immunized conduct would help rather than harm consumers, then an exemption should not be necessary. I agree with the AMC that Congress should be wary when considering exemptions from the antitrust laws. I believe that the Judiciary Committees in Congress share that belief. Exemptions should be granted only in the narrow circumstances when competition cannot achieve identified societal goals that outweigh consumer welfare, or when a recognized market failure could be overcome by a well tailored mechanism to bring the market closer to a competitive outcome (although I think we should be dubious of such efforts likely succeeding in actual practice – even the best-tailored mechanisms often lead to unintended results that ultimately harm consumers).

The AMC proposes a sound set of steps for evaluating the need for existing or new immunities. Congress should create a full public record on any immunity or exemption under consideration. Proponents of an immunity should be required to submit evidence showing that the gains to consumer welfare achieved through competition are of less value than the goal promoted by the immunity, and that the immunity is the least restrictive means to achieve that goal. Congress should also consult with the Federal Trade Commission and the Antitrust Division to examine whether the conduct at issue should be subject to antitrust liability and to evaluate the likely competitive effects of the existing or proposed immunity.

The Division has been very active with respect to promoting competition over exemptions. For example, the Division has actively advocated its views on the harm to consumers from rules at the state level that reduce competition among real estate brokers. The Division has made filings before state real estate commissions and in state courts,

and works with state legislatures and governors. The information and analysis we have provided encouraged several states to modify proposed or existing laws and regulations. As a result, Delaware, Tennessee, Ohio, and Wisconsin passed bills that included a provision that empowered individual consumers to choose not to purchase unwanted types of real estate brokerage services. And, in the last few years, real estate commissions in West Virginia, Kentucky, and South Dakota, and South Carolina lifted bans on consumer rebates and other inducements to consumers in real estate transactions. We intend to be proactive in continuing to advocate that American consumers be protected from ill-advised immunities and exemptions.

## **II. Criminal Remedies**

Having praised the AMC up to this point, now let me turn to an area – criminal enforcement – in which I have mixed reviews for the AMC recommendations. First, an area of agreement: the AMC does not recommend any changes to the antitrust laws or to the Antitrust Division’s practice in the area of criminal enforcement. I agree with the AMC that criminal antitrust enforcement should continue to be limited to horizontal cartel violations, that is, “naked” price-fixing, bid-rigging, and market or customer allocation agreements.

But now, an area of strong disagreement: the AMC’s recommendations that the U.S. Sentencing Commission modify the methods of calculating fines. Specifically, the Commission has recommended that Congress should encourage the Sentencing Commission: (i) to review the 20 percent volume-of-commerce proxy for computing organizational fines, and (ii) to make the 20-percent proxy for harm rebuttable.

For two decades, there has been unwavering support by the Department of Justice, the Sentencing Commission, and Congress for substantial corporate antitrust fines based on the volume of commerce affected by a defendant's violation. Because the antitrust guideline is based on the principle of general (rather than specific) deterrence, punishment for antitrust violations need not be based on a precise calculation of actual gain or loss, which can be very difficult in an antitrust case. Affected volume of commerce was chosen as an acceptable and more readily measurable substitute. Based on empirical data available to it in 1987, the Sentencing Commission estimated that average overcharges in price-fixing cases amounted to 10 percent of the volume of affected commerce; since fines needed to be higher than the actual overcharges to achieve general deterrence, the Sentencing Commission initially set fines at 20 to 50 percent of the affected volume of commerce.

Congress raised the maximum corporate Sherman Act fines from \$1 million to \$10 million in 1990, and then from \$10 million to \$100 million in 2004. These changes provided additional deterrence to large-scale cartel violations of the type that the Division continues to uncover involving billions of dollars of affected commerce. Congress endorsed the twenty-percent conversion factor in the legislative history of the 2004 Act, stating that "... Congress does not intend for the Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy. This presumption is sufficiently precise to satisfy the interests of justice, and promotes efficient and predictable imposition of penalties for criminal antitrust violations." 150 Cong. Rec. H3658 (daily ed. June 2, 2004).

Then, in 2005, when the Sentencing Commission reconsidered the antitrust guideline in light of the increased statutory maximum fines adopted in 2004, it chose not to alter the methodology in place since 1991. Recent empirical studies suggest that the Sentencing Commission's initial determination of a 10 percent overcharge in price-fixing cases is, if anything, an underestimate. Since the essence of general deterrence is to punish severely the defendants who are caught in order to discourage unlawful conduct by others who perceive that there is some chance they will not be caught, the 20 percent harm proxy continues to be an effective, and I believe correct, approach to antitrust sentencing.

Making the proxy a rebuttable presumption would permit defendants to litigate the issue of monetary loss in every antitrust case. Currently, given the proxy and the per se nature of criminal antitrust violations, issues of loss are not litigated as part of the case in chief; nor do they need to be litigated at sentencing.

Criminal antitrust violations should be punished severely. Despite our best efforts at stopping cartel conduct, the temptation to engage in such conduct apparently is tremendous. We need to punish such conduct harshly, rather than seeking ways to lighten the potential punishment on antitrust felons or to increase the cost of enforcement.

### **III. Transparency**

Now I will turn to an area where I am in general agreement with the AMC, with slight caveats – the AMC recommendations on transparency, in particular with respect to merger enforcement. The Antitrust Division believes that transparency is vitally important in merger review because voluntary compliance with the law is in everyone's



interest, and compliance depends on knowing the rules. Ultimately, the public's confidence in the ability of the antitrust laws to promote competition relies upon transparent, predictable decision-making, along with an analytical framework based on sound economic principles that can be applied consistently.

The AMC report has four specific recommendations for increasing transparency:

- **First**, to issue more closing statements explaining decisions not to challenge transactions;
- **Second**, to continue regular reporting of statistics regarding merger enforcement;
- **Third**, that the agencies update the Merger Guidelines to explain how the agencies evaluate the potential impact of a merger on innovation; and
- **Fourth**, to update the Guidelines to include an explanation of how the agencies evaluate vertical mergers.

#### A. Closing Statements

I agree that the Division's closing statements have been a useful tool and should be continued. The Antitrust Division's theories and evidence of anticompetitive harm for those mergers that the Division decides to challenge are available in complaints, press releases, and competitive impact statements. On the other hand, the public often has as much interest in knowing why the Division decides not to bring an enforcement action in particular cases. When the Division closes a significant investigation of a merger after an extended review, the public and antitrust bar may be left to speculate why the agency declined to seek relief. Therefore, increasingly over the last few years, the Division has endeavored to issue closing statements that fully describe its rationale (constrained, of course, by rules relating to confidentiality).

We issued closing statements regarding our decisions not to challenge the Maytag/Whirlpool and AT&T/BellSouth mergers. The Maytag/Whirlpool closing statement demonstrated the importance of a thorough analysis of entry in a dynamic market. While the merger would create the largest domestic manufacturer of washing machines and dryers, the Division's closing statement demonstrated how domestic retailers—particularly the largest big-box and discount retailers—had significantly shifted to new brands and displaced Maytag products altogether, while both domestic and foreign manufacturers had substantial capacity and ability to expand sales. The AT&T/BellSouth closing statement explained how the merger of two of the four remaining incumbent local exchange carriers from the old Bell monopoly did not threaten harm to competition based on detailed fact-finding in all of the relevant antitrust markets. That closing statement discussed in particular the Division's investigation into local private lines and other services provided to large business customers. It further discussed the importance of entry, new technologies, and a changing regulatory landscape to competition in residential local and long-distance service, and in internet and wireless broadband service. The Division intends to continue to issue closing statements when it determines they will be useful.

#### B. Statistics on Merger Enforcement

I think the AMC's recommendation that the Division and the FTC periodically release merger enforcement statistics is a good one. Publicly available statistics based on data the Division actually keeps in the course of its day-to-day operations frequently will increase transparency with little or no additional costs imposed on enforcement or

confidentiality. Making data available on actual enforcement actions can provide valuable insights into how the agencies apply our stated policies. Along with public statements about individual cases, these data can provide additional transparency regarding our enforcement practices. The Division plans to continue this practice, and it increasingly coordinates its internal collection and maintenance of data on merger enforcement activity with the FTC.

The Division's transparency efforts also have included the release of a joint DOJ/FTC Commentary on the Horizontal Merger Guidelines in March 2006. The Commentary, which is available on both agencies' websites, explains how the Division and the FTC have applied particular guidelines provisions relating to market definition, competitive effects, entry conditions, and efficiencies. The Commentary is the latest chapter in the agencies' ongoing efforts to provide guidance to the antitrust bar and businesses regarding how the agencies enforce Section 7 of the Clayton Act.

### C. Guidelines for Analyzing Innovation

One of the areas where guidance is important is the potential impact of a merger on innovation. The Division and the FTC recognize that efficiencies that reduce the cost of R&D and other recurring common costs will help to drive down price over time and lead to greater innovation and improved products. In the last several years we have increased our ability to take account of the effects on innovation as part of our objective that antitrust protect dynamic efficiencies. Today the agencies are better than ever at analyzing the claims of parties that a merger will enhance their ability to innovate.

Nonetheless, I question the call of the AMC for updating the Horizontal Merger Guidelines to explain more extensively how the agencies evaluate the potential impact of a merger on innovation. The 2006 Guidelines Commentary has provided additional guidance on how the agencies evaluate innovation in the context of merger review. The antitrust laws are sufficiently flexible to account for innovation, and standard application of the Horizontal Merger Guidelines will continue to capture any effects that mergers may have on innovation. I believe at this time that our merger complaints, competitive impact statements and closing statements will result in greater clarity and be of more substantial use in this regard than would a general update of the Horizontal Merger Guidelines.

#### D. Vertical Merger Guidelines

I also have doubts regarding the AMC's call that the agencies should develop new guidelines for non-horizontal mergers. As the AMC report noted, significant thinking regarding vertical mergers has taken place since the 1982 and 1984 Guidelines. The agencies now recognize that vertical mergers tend to promote efficiency by, for example, eliminating double marginalization. Vertical mergers therefore should be permitted except in those few circumstances in which a careful analysis of the transaction shows likely competitive harm. But because vertical merger analysis is such a factbound exercise, and because the great majority of vertical mergers will be procompetitive, generating guidelines for vertical merger analysis may not be a productive exercise.

A simpler approach might be to focus on the issues that arise in vertical mergers most often. At the Antitrust Division, we usually apply only a handful of theories to

vertical mergers, often in a few areas relating to the defense industries. The Division has had the opportunity to explain how it applies these theories to specific mergers in complaints and competitive impact statements. Guidelines based on the most common issues, as a result, would not provide much additional guidance.

I believe that the Division should include vertical merger enforcement in its broader efforts to increase transparency. Within investigations, the Division recognizes that both our staff and the parties benefit from a frank exchange of ideas and evidence, and the Division encourages an early substantive dialogue because we are seeking to get to the right answer and want to hear their responses to any concerns as soon as possible.

#### **IV. Section 2 Standards**

Moving to the AMC's recommendations on Section 2 of the Sherman Act, evaluating single-firm conduct under Section 2 poses the toughest challenges to antitrust analysis today. Single-firm conduct is the "moving target" in antitrust, as businesses constantly innovate in how they compete with each other. While the development of new business practices has long been recognized as the kind of activity the antitrust laws were designed to promote, antitrust must constantly adapt with the business community to identify those circumstances when the conduct of a firm acting unilaterally can harm competition.

There is a lot in the AMC's recommendations on Section 2 with which I agree. I agree that Congress should not amend Section 2 of the Sherman Act. The language of Section 2 and the case law interpreting it make up a flexible body of law that can be used to target anticompetitive actions while allowing vigorous competition.

I also agree that the standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. While it is possible to disagree with the decisions in particular cases, the courts, especially in the last two decades, have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors generally do not run contrary to the goals of antitrust.

For this reason, I agree that clarity and improvement are best achieved through the continued evolution of the law in the courts, and the continued application of new economic learning to develop clear and consistent standards. The Division and the FTC have encouraged public discourse and hope to aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of various business strategies.

To this end, the Antitrust Division and the FTC recently held a series of public hearings on single-firm conduct. The agencies solicited comments from lawyers, economists, businesses, consumer groups, academics, and other interested persons on the relevant legal and economic principles underlying Section 2 and on real-world examples of single-firm conduct. Panelists included legal and economic experts, as well as academics, judges and business representatives.

These hearings focused on a broad range of conduct, including predatory pricing, predatory buying, refusals to deal, tying, exclusive dealing, bundled loyalty and market share discounts, misleading and deceptive practices, market definition and market power, remedies, as well as foreign antitrust enforcement, empirical studies, business history and strategy, and business and academic perspectives on single-firm conduct. The final

hearing, on May 18, 2007, reviewed a wide range of enforcement and policy issues, including the analysis of monopoly power, various proposed standards for exclusionary conduct, and challenges in applying those standards to specific practices. The agencies hope their hearings and ultimate report on them will lead to a clearer understanding of when it is appropriate to challenge unilateral conduct under the antitrust laws and will provide firms with more usable standards for assessing their business strategies before they implement them.

The Division and the FTC also participated as amici in a number of important section 2 cases. For example, in the last term the Supreme Court sought the government's views in *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, a case alleging predatory buying. The Division and the FTC argued on the merits that the requirements for predatory selling should apply to buy-side price predation, and also argued that the court of appeals' subjective liability standard would likely deter procompetitive conduct by large firms. A unanimous Supreme Court agreed with our position. We intend to continue to be active on Section 2 issues in appropriate court cases.

## **V. Clearance**

Finally, I would probably be remiss if I did not at least touch on the area of clearance, the process by which the Antitrust Division and the FTC decide which will investigate a transaction. The first pages of the AMC report affirm "[t]he agencies have done a good job minimizing problems that can result from dual enforcement." I agree with that. The Division and the FTC have devoted significant time and effort to making

sure that matters are cleared to the appropriate agency as quickly as possible, while also minimizing the burden that clearance delays may impose on merging parties.

The current process is based on the principle that the agency with the greater experience in the pertinent industry reviews each merger in that industry. This is a sound basis, and the process works well in the large majority of cases. While over 80 percent of mergers reported under the HSR Act during the last five years did not raise competitive concerns, and thus did not result in a clearance request by either agency, in most of the other cases, when one agency requests clearance, the other agency usually grants it quickly due to a recognized history of expertise. Thus, the issue of clearance disputes, although generating much discussion and debate, is actually one that affects few transactions.

Nevertheless, clearance disputes can impose significant costs and delays in a few instances. I agree with the AMC report that the clearance process could be improved. Indeed, the Division continues to work on expanding institutional mechanisms that have proven to be effective as well as trying to find mechanisms that would improve the process. To this end, I and other senior officials communicate frequently with the FTC, and continually consider improvements.

## **VII. Conclusion**

The AMC's work was finished in May. The agencies have followed with interest the AMC's hearings, we have combed through the report, and we continue to think about the AMC's recommendations. Many of the recommendations will have a positive,



lasting impression on antitrust. A number of recommendations are just the beginning of a much longer discourse. As Congress digests these recommendations, I am confident that it will consider the AMC Report an important document in support of sound competition policy.